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TRADITIONALISM AND LAW REFORM IN AFRICA

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TRADITIONALISM AND LAW REFORM IN AFRICA*

Introduction

The purpose of this paper is to discuss what I consider to be one of the sources of opposition faced by initiators of law reform in many parts of Africa. Even though what I describe happens in other parts of the third-world, this paper is primarily concerned with the African region. I subsume the nature of this opposition under the term 'traditionalism'. By traditionalism I mean a form of ideology which opposes attempts at law reform, arguing that to do so would be contrary to the people's traditions and culture.

This paper argues that such opposition to law reform is in some cases part of a political reaction against colonial imposition of an alien legal system and arises from an attempt to reassert the lost dignity of traditional institutions. Other forms of opposition to law reform are those who view the contemporary African social formation as being in a state of acute disequilibrium and conflict. The causes of conflict are seen to be closely associated with disruptive external influences and law reform is then seen as part of that influence. Finally there are traditional elders and other elites who are beneficiaries of the traditional order. These are able to combine the modern and traditional systems and to use them either to improve on their poor economic positions or to gain power and influence. The latter have an interest in supporting traditionalism from which they derive their authority and social security.

These arguments are examined critically in this paper and an effort is then made to give an interpretation of the process of change and to make a case for enlightened law reform.

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Traditionalism at work

Until the 1960s most of black Africa was under colonial rule. The European governments which took over power in this region imposed th own legal systems upon the subject people. In the case of Britain, its policy of indirect rule was applied to grant recognition to certain traditional laws and customs, on condition that these customs did not conflict with the written laws or with British idea of natural justice, equity and morality.[1)]

Whether or not limited recognition of the traditional legal systems was given, imposed legal system of the colonial state prevailed over the indigenous systems. In the interest of "law and order" customary criminal law was abolished and replaced with that of the colonial power. Consequently it became an offence for indigenou courts to impose any punishments upon offenders.

In the fields of family law, traditional marriages were not given the same legal standing as Christian monogamous marriages. The former were considered by the colonial state and law to be an inferior form of marriage which was merely tolerated but greatly disapproved. In this regard the opinion of Chief Justice Hamilton in the case of R. v. Amkeyo[2)] is a good illustration of this official attitude.

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1) Tanganyika Order-in-Council 1920; Uganda and Kenya had similar provisions in their Orders-in-Council.

2) 7 E.A.L.R. (1917) 14 in which the learned Chief Justice stated as follows:

> "In my opinion, the use of the word "marriage" to describe the relationship entered into by an African native with a woman of his tribe according to the tribal custom is a misnormer which has led in the past to a considerable confusion of ideas, I know of no word that correctly describes it; "wife-purchase" is not altogether satisfactory but it comes much nearer to the idea than that of "marriage" as generally understood among civilized people."

Although the colonial officials who believed that they had a civilising mission to accomplish in Africa were happy with the state of affairs, the colonised people were dissatisfied with the imposed system and viewed it as part of an alien system of colonial rule which at independence would be eliminated and substituted with an African legal system.

Soon after independence many African countries became involved in the exercise of reforming their legal systems. For example, in the East African states, new legislation were enacted to unify their court systems and a process of recording and re-stating customary laws was initiated in Kenya and Tanganyika.[1] This period also saw the convening in London of the African Conference on the Future of Customary Law. This was followed, in 1964, by the African Conference on Local Courts and Customary Law, held in Dar es Salaam.[2]

These efforts to formulate an appropriate system of law for independent African states were often backed by an attack on the colonial legal system. The line of attack was often combined with an emphasis on the virtues of the traditional system and the two became somewhat inseperable. Martin Chanock documented this process at work in Malawi where he found that "the assertion of Malawian law and legal ideas in opposition to their foreign counterparts has been explicit and frequent, and has been the rationale for the purported rejection of the colonial legal structure" (1978:81). Chanock notes that the decision of the Malawi government to establish "traditional courts" alongside the ordinary court system was prompted by a feeling among senior politicians that the court system and the laws left behind by the British were far too lenient and had resulted in many offenders escaping from justice.

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1) See for example, Tanganyika Magistrates' Courts' Act, 1963, No. 55 of 1963, and Uganda Magistrates' Courts' Act, 1964, No. 38 of 1964, G.N. 279/1963.

2) In 1964 there was another Conference at Ibadan, Nigeria, which was also concerned with the integration of customary law and modern legal systems in Africa. See also A. N. Allott, (1964); "A Note on Previous Conferences on African Law" in the Proceedings of the Ibadan Conference - pp. 4 - 16.

In Tanzania, the establishment of the People's Courts in Zanzibar in the place of ordinary courts were motivated by similar considerations. More recently traditionalism was seen at work when some MPs opposed certain aspects of the Bill introducing a new law on marriage and divorce in Tanzania. For example, one MP opposed sections 11 (1) and 20 (2) of the Bill on the ground that they were contrary to African traditions.

Section 11 (1) provides that a marriage contracted in Tanganyika may be converted from monogamous to potentially polygamous by a joint declaration of both parties before a court of law.[1)]

Section 20 (2) provides that

> "where a man married by a polygamous marriage has given notice of an intended marriage, his wife or, if he has more than one wife, any of his wives may give notice of objection to the registrar ... on the ground that:
> (a) having regard to the husband's means, the taking of another wife is likely to result in hardship to his existing wife or wives and infant children, if any; or
> (b) the intended wife is of notoriously bad character or is suffering from infectious of otherwise communicable diseases or is likely to introduce grave discord into the household."

The MP argued that if the law were to require a husband to obtain permission from his wife before he could marry a second wife, "the man's authority in the family which is derived from African tradition would be greatly undermined and women would be given far too much power than they are permitted under our African traditions". There were cheers from the rest of the House (1971:129).

Emphasising this point the MP stated that,

> "among certain tribes in this country, it is unacceptable for a woman to give the last word on an important matter such as marriage (cheers). This is because according to African traditions the person who can give the last word to stop a marriage is a parent and not a first wife ...
> Mr. Speaker, I believe that the sexual equality we are promoting is not intended to turn the women of Tanzania into men. ... (cheers). The kind of equality we are building, Mr. Speaker, is that which will enable Tanzanian men to continue to be men and the women to be women. (Laughter and cheers). (trans. BAR)"

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1) S. 11 (1) A marriage contracted in Tanganyika may be converted
a) from a monogamous to potentially polygamous; or
b) if the husband has one wife only, from potentially polygamous to monogamous,
by a declaration made by the husband and the wife, that they each, of their own free will, agree to the conversion.

There were contributions from other MPs to the same effect.[1)]

A similar process can be seen at work in Kenya where the new marriage bill has been presented a number of times and rejected by the Parliament.

Writing in the Sunday Nation newspaper about polygamy in Kenya, a prominent journalist, Philip Ochieng stated that the Kenya government was undecided whether to abolish polygamy or to accord it equal recognition under the general law of Kenya. Ochieng criticised supporters of monogamy noting that monogamy was a product of European capitalism which was opposed to the maintenance of the extended family and killed the "spirit of mutual service in the family, the clan and the whole society". He argued that if polygamy was a social evil as depicted by the "messengers of the Euro-Christian civilisation" how was it that African social systems which revolved around polygamy for centuries were successful?[2)]

Iona Mayer recorded traditionalism at work among the Gusii people of Kenya. She found that although men talked a lot about "the ways of [their] ancestors" they had at the same time got involved in non-traditional economic activities such as cash-crop production and wage employment. Furthermore Gusii men drew from tradition to maintain what Mayer calls the patriarchal image and to exclude women from external influences. Thus whereas young men were permitted to engage in employment and in other non-traditional economic activities, "one young woman who dared a nannying job for a white official's family was loudly branded a loose liver". Traditionalism, in the case of the Gusii, operated to deny women equal opportunities in economic matters with the result that there

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1) For example, Hon. Mtambo, MP, thought that if the purpose of the Bill was to repeal the colonial marriage laws which were based on Christian ethics, it was therefore inconsistent with this aim for the new law to give women rights which they did not possess under African traditions (P. 134).

2) Cited in ATLAS, June, 1971.

emerged a group of

> "male new elite [consisting of] a few government chiefs, a few clerks, entrepreneurs, a young college student - but on the female side only the traditional idea of the "fine woman" (eting'ana) who produced abundant food and beer for her menfolk, like the Woman of Virtue in the Book of Proverbs (1975:268)."

In a paper titled, "The possible political Implications of abolishing certain elements of Customary Law in Zimbabwe", Joshua Mpofu states that opposition to certain changes in the Zimbabwe law of marriage and inheritance would come mainly from traditionalists who benefit from the system and from some opposition party members who might seek to use the occasion by projecting themselves as champions of traditional values and customs to gain political ends (p. 6). This opinion was strongly confirmed by my own discussions with Zimbabwe government officials and by the views expressed by participants at the two seminars I gave at the University of Zimbabwe.[1)]

The foregoing discussion is not intended to be exhaustive on the subject but merely to illustrate the fact that strong forces exist in Africa today which seek to use traditionalism as means of blocking attempts at law reform. One way of dealing with this opposition is to show that traditional social and economic relations, on which traditionalism relies, have in reality been radically transformed in most of Africa.
I examine in the next section some recent researches on social change in Africa and how these help to advance the argument of this paper.

Traditionalism and Social Change

When traditionalism is used as an argument against a particular piece of legislation or government policy, one gets a feeling that what is being demanded is a clear-cut choice between

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1) One participant expressed an opinion that obedience to certain traditional obligations was a matter of life and death because failure to obey would unleash punitive "visitations" from the spirit world. See also Chigwedere (1982:2).

retaining an alien system of law or adopting a system which is in accord with African traditions and culture. For example, on the question of polygamy in Kenya, Philip Ochieng sums up the problem as follows:

> "It seems to me that a dangerous ambivalence is prevalent in the minds of most African societies, and they appear unable to make up their minds to which value to lay down. I think that the time is coming when we will just have to make up our minds whether to follow African traditional beliefs or whether to assume Euro-Christian ones."

An argument couched in these terms and made soon after independence can appeal to many. Politically, it represents a further move against the institutions of the former colonial power and can be used as a means of isolating fellow politicians who are committed to reforms. These arguments are powerful and politicians have used them before to organise the masses against the colonial administrations. In the post-colonial period traditionalism is still used to gain political advantages.

Yet even if traditionalism is ahistorical because of its failure to be guided by a correct theory of social change, it is not wise to dismiss it without an attempt to refute its basic assumptions. In this part I give a brief review of relevant research about African social systems. Such a review will, I hope, provide a broad picture of the effects of economic and social change in Africa and may help to remove some of the misconceptions on which traditionalism often relies.

Nineteenth century researches about African social systems which were done mostly by historians and anthropologists can be criticised on a number of points. I will deal with two important ones. The first is that ethnologists and social anthropologists, especially those of the structuralist-functionalist tradition, were interested in discovering social harmony among the societies they studied. In order to do this they selected small groups and studied them in isolation. This bias, notes van den Berghe, has led these scholars "to disregard or at least to underrate the amount of conflict, disequilibrium and contradiction existing in African societies" (1965: 2 - 3).

The second shortcoming is that these scholars lacked a dynamic theory or perspective which would be used to understand the changes which were taking place in many African societies at the time. Consequently these scholars ignored the ongoing processes of change and instead emphasised what they considered to be the authentic social institutions and relationships of the societies they studied. The result of this approach was that they viewed change as disruptive and were generally interested in maintaining the status quo. They adopted what van den Berghe has called "a kind of benevolently protective anti-quarianism" towards African social systems.

From about the 1960s this brand of scholarship has declined and is now being overtaken by a new kind theorising which seeks to understand social processes historically. There are ongoing internal self-criticisms among various branches of the social sciences.[1)] For example, sociologists no longer treat African societies in the same way as their predecessors. Their work looks at African societies as part of a wider world beyond the village or clan boundaries. Studies dealing with the integration

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1) For example, a series of monographs have been published with Professor Jack Goody as the General Editor whose aim it is to show how specific societies and cultures have developed and changed in response to conditions in the modern world. Authors are required to draw on recent fieldwork and to present a comprehensive analysis of a particular group, "cast in a dynamic perspective that relates the present both to the past of the group and to the external forces that have impinged upon it". As the publishers have noted, "the range of volumes in the series reflects the developing interest and concerns of the social sciences, especially social anthropology and sociology". For some African titles in this series see J.S. Eades, The Yoruba Today; Cambridge Univ. Press, and R.G. Abrahams (1981) The Nyamwezi Today: A Tanzania People in the 1970s; Cambridge Univ. Press.

of African social and economic formations into a world economic system are now being undertaken (Lloyd 1973; Gutkind & Wallerstein 1976; Mamdani 1976; Seddon 1978; Fitzpatrick 1980; Snyder 1981). With this theoretical advance in the social sciences, urbanisation is no longer considered a disruptive influence of a self-contained rural community, but a powerful agent of change. The centralisation of political authority since the colonial era, peasant production of commodities and generally the penetration of the money economy, have all affected African social systems in varying degrees.

Therefore, a general conclusion which current theory and research in African social systems has reached is that in the first place the African social systems have never been static as the 19th century scholars appeared to imply. Secondly, that since colonisation, there has been rapid change which is still underway and there is no possibility of stopping this process. In view of all this it is necessary to examine how this change has affected certain aspect of African family relations.

The African Traditional Marriage

Although African societies were far from being homogenious, there are certain aspects about them which can be generalised. One of these is the traditional African marriage. A marriage among many African societies was a contract involving the wider family group. Marriage served a number of related functions of which the three most important ones were the continuation of the lineage group through natural reproduction, the provision of productive labour, and the use of marriage as a means of establishing wider political and economic alliances between affinal groups. Marriage thus provided a framework for realising wider goals which were beyond the concerns of the immediate parties to the relationship. Given these functions of marriage, it was necessary that a larger social group should participate not only in the process leading to marriage, but also in the life of the couple. All this goes to underline the importance which many African societies attached to the marriage relationship.

Writing on the Shona, Dr. Bourdillon notes that a traditional Shona marriage "is essentially a contract between two families" 1973:52) and that the negotiations towards marriage normally require participations of senior representatives of each family. Other writers on the traditional African marriage have expressed similar views on the question.

The participation of wider family members in the marriage of their kin is also reflected at the level of transfer of marriage payments. Among the Kuria of northeastern Tanzania, bridewealth cattle was given by the father of the intended husband to the family of the intended wife. Traditionally, the father drew from the cattle given to him for the marriage of his daughters. Normally a full brother's marriage was paid for using the cattle of his full sister. The system of using a full sister's bride-wealth has been noted also among the Shona by Professor Holleman who describes it as follows:

> The cipanda system is based on the principle that cattle received in connection with the marriage of a daughter should be used to provide a wife for her brother. A particular brother and a sister may thus be "linked" for the purpose of rovoro and the brother will then refer to his linked sister or to the cattle received in connection with her marriage as "my cipanda".

Similar arrangements have been reported to exist in other African societies. Hence, as noted by Goldin and Gelfand, "the need and ability to provide lobolo for a son is obviously of paramount importance and a variety of customs exist concerning the acquisition of sufficient cattle for this purpose" (1975:130).

What emerges from the foregoing summary is that payment of bridewealth was not an individualized affair. It was a matter for the concern of a wider family. The system of mutual assistance in bridewealth transfers was part of a wider economic inter-dependence and kinship solidarity which obtained in many African societies during the pre-capitalist era. But this economic inter-dependence was based upon a number of other relationships. Agri-culture was undertaken by mutual aid teams, and so was livestock husbandry. Children, being so dependent on the elders for their marriage cattle, worked very hard for their fathers and were

obedient to them. In return the fathers assisted their sons to establish their own families. They also paid fines and damages in respect of their sons' wrongs.

So far as the daughters were concerned, they had to submit to the orders of their fathers. For a daughter to disobey a father was a very risky matter. If her father banished her from the homestead she had nowhere else to go and people who knew of her case would be reluctant to receive her. Therefore, these were ideal conditions for the daughter to obey the father.

As already noted, the son depended upon his father for the marriage cattle and he had little choice in the matter but to accept the wishes of his father. But a father also had a big stake in the marriage of his sons because through such marriage, the affinal relationship was created. Affinal relationships were very important politically for fathers (Mayer 1975:275). A father of the intended husband and his kinsmen had other reasons for wishing to determine the marriage choices of their children. Such large transfers of bridewealth could only be made to a friendly family group. As noted by some anthropologists, transfer of property establishes blood relationship and one is often anxious to establish such relationship with people of whom one approves. Fathers also claimed to have a right to decide the choices of their children's marriage because they knew which people were not suitable for marriage either because they were related to them or because there was another impediment such as witchcraft practices, a feud between the two families or familiy diseases.

All these considerations, including appeal to traditional religion and ritual, operated together to give a traditional African marriage its distinctive characteristics.

Contemporary African Marriage

Yet this relative stability in social relations was not maintainable in the face of changes which followed colonial rule. The introduction of formal education, wage employment and the expansion of communication facilities resulted in the movement of the young generation into government and mission schools and urban centres - far away from the watchful eye of the parents. In schools children learnt romantic love and wished to marry people they knew and loved and not those selected for them by their parents. In traditional times the movement of a girl used to be watched to find out who she talked to, but formal education enabled daughters, for example, to receive letters from their boy-friends which fathers could not read. And those parents who could read the local language, found themselves unable to cope with love-letters written in English or French. This example alone illustrates how parental control was affected by formal education.

On the other hand, sons who went into wage employment were able to raise sufficient resources to pay for their own marriage. This led to the loss of control by parents of their children's marriage choices. This phenomena has been so common in Africa that it may soon be possible to say that a customary rule has emerged whereby the prospective husband has a right to select a partner. Indeed Michael Bourdillon commenting on this practice among the Shona states that "although the choice of spouses is now ... left to the persons concerned ... the negotiations towards marriage normally require participation by senior representatives of each family" (1976:52) (emphasis BAR). In some parts of Shona country this participation is probably about to disappear (Chigwedere 1982: 41 - 42).

Therefore, as the marriage relationship continues to become an individualised affair, ceremonies becoming shorter, bridewealth turning into cash to be given by the son-in-law, there will be a reduction in the number of people who will participate in such marriages. Fathers will cease to link up daughters and sons through a system of cipanda because daughters can no longer be relied upon to accept every marriage arrangement which their parents make.

Where daughters decide to marry men who are unable to give cattle, their brothers will go without wives unless they are able to raise the resources otherwise.

The case of Esther which I came across in the Tarime district of Tanzania illustrates this type of dilemma which parents continue to face. In 1970 a young girl named Esther was withdrawn from primary school at the age of thirteen years and forced into marriage with a man who was as old as her father. The husband, Mzee Wambura, had given seventeen head of cattle to Esther's father to pay for the marriage of Esther's brother. Esther did not accept this arrangement and consequently escaped to Mwanza, a distant town where another elder brother was employed. Esther was then put back into primary school but soon after to be withdrawn by her father who took her back to his village. She was handed back to her husband but Esther escaped again. This time she went farther away to Morogoro, a distance of some 1,000 km from Tarime, to which town her brother had been transferred. There she met a boy-friend with whom she started to cohabit and had a child by him. Later Esther decided to go home again to see her parents. Her father once again suggested that she should go to her husband. When Esther refused, her father took away her child and all her clothes and handed them to Mzee Wambura. Esther at once reported the matter to the Tarime police where she was advised to go to the Ministry of Social Welfare. Esther's father was summoned at the Social Welfare office and warned. He was ordered to return his daughter's clothes. In his defence, the father argued that he was requiring his daughter to stay with Mzee Wambura because he did not have cattle to refund to him. Nevertheless, if Esther could find a man to pay the cattle, her father would be willing to ignore her refusal to return to her husband. The Social Welfare official informed Esther's father that his daughter was not obliged to be married at all and could stay single if she so desired.

What we learn from this case is the problem arising from the decline of parental control over the selection of their children's spouses. A recent research report on marriage in Africa has noted that

> ... parental authority over many aspects in the children's life is slakening. Whereas in the old days the choice of marriage partners was made by the parents, or the families, today this system is rejected by the young people. They insist on making their own choices and in many instances the parents give in. Any show of resistance on the part of the parents can easily drive the young lovers to an elopement or a decision to live together (Kisembo et al 1977:124). (See also Lloyd 1972:95).

In the light of these changes it cannot be said that the traditiona rules concerning choice of spouse will continue to be enforced by parents. Similarly the system of cipanda will soon disappear or change.[1)]

Yet loss of parental control over the process of spouse selection is not an isolated matter. It is part of a wider process of social change which has affected other aspects of the family. This point can be demonstrated further by taking the example of the transformation of bridewealth. Everywhere in Africa bridewealth has become an individualised economic transaction between the father of the prospective wife and the prospective husband or his father. Bridewealth has lost virtually all its traditional attributes even though it has retained its name. The continuous escalation of bridewealth rates has been the cause of sharp and regular criticism from many sections of the community throughout Africa. In a recent book Aeneas Chigwedere has made a very strong critique of bridewealth among the Shona of Zimbabwe. He shows how bridewealth served certain traditional functions but how today individuals have turned these functions upside down to gain personal economic advantages. He cites the example of a small payment known as mapfukuzda dumbu (literally meaning to distort the womb) which was given to the mother-in-law as compensation for the distortion of her woumb. Such payment was made only in respect of the first born daughter. As Chigwedere puts it, the argument for the payment was that "the mother-in-law was shapely before her first pregnancy which gave birth to the daughter now being married", (1982:6). In contemporary Zimbabwe the mapfukuzda dumbu has taken a new form. In addition to rising in quantity, it is now being claimed

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1) For similar reports concerning conflicts over marital choices in Bunyoro, Uganda, see Beattie (1964:258).

by both the mother-in-law and the father-in-law and it is also claimed in respect of all daughters including the last born who necessarily finds her mother's womb distorted several times over. What is perhaps so interesting about this transformation is that whereas the father-in-law now claims compensation for the distortion of his 'womb 'he continues to claim matekenya ndebvu (literary meaning to pull one's beard). This is a payment by the son-in-law to compensate the old man for having had his beard pulled by the prospective bride when she was a little girl. This change cannot be explained using traditional logic except of course that the father of the bride has power to give away his daughter or to refuse if his demands are not met.

Another aspect of Shona bridewealth which has become transformed is the bride's share. Shona tradition provides that when the marriage negotiations have been completed and preliminary payments have been made, the bride is called upon to give her consent to the marriage by "picking" her share. The process of picking is referred to as "kunonga". According to Chigwedere, the prospective bride was assisted by female relatives who came forward to "pick" on her behalf. Traditionally the paternal aunt with the bride's sisters and the bride herself, discussed what was to be picked and informed the family of the prospective husband. The range of items which could be picked included copper bangles, sea shells and beads. As noted by Chigwedere, "this part of lobolo was not intended to enrich the bride but served as a public declaration that the bride consented to marry the suitor" (p. 7). In some parts of Shona country today, kunonga has become transformed in a variety of ways. For example, in addition to having turned into money, many relatives come forward to "pick" not for the bride but for themselves. In the Gutu and Nyanda areas it is reported that up to five relatives are involved in "picking" what in traditional times used to belong to the bride alone.

Rapid rise in the quantity of bridewealth has been reported throughout most of Africa. It is also true that bridewealth has changed into money and a variety of consumer goods. What must be stressed

however, is not the fact that bridewealth has changed from copper wire into money or that the amount has gone up, rather we should look at these changes as outward manifestations of a deeper form of change which has transformed social relations and removed the basis on which rested all these traditional economic exchanges. Peasant households threatened by the rise in the cost of living, faced with a declining income and a general social insecurity arising from economic change, are forced to maximise on the only source of income they have. This is one of the reasons why bride-wealth has to keep rising. Hence a prospective son-in-law with a good income is a preferable suitor because he can pay a high rate. A daughter who has completed High School or University must be married for a higher rate because she is going to earn money for her husband. And yet all these payments are 'traditional' because traditionalism maintains a protective mantle over them.

The Need for New Rules

The question which must be asked is whether it is reasonable to expect parents to consent to a marriage of adult daughters to men they have never seen (in the case of marriage taking place far away from home)? What if the couple comes from different ethnic groups or even countries? In a marriage where the couple is hoping to live for most of the time away from home, it appears oppressive for a father to insist on determining something he knows little about.

Recently an interesting case outside the context of marriage occurred in Dar es Salaam. It concerned the grant of permission for a son to start using a newly built house. Under traditional Haya society, where a son builds a new house, he is not allowed to start using it until the father authorises him. In traditional times such a house was usually built on a plot of land allotted to the son by the father. Usually the father assisted in the construction of the house, etc. It seems this was a good rule when applied in the context already referred to.

In the case of the Dar es Salaam son however, he had built a house on a government plot using a Tanzanian Housing Bank loan and his

father was in no way involved. Indeed, he had sought and obtained a building permit from the City Council. But when the house was about to be completed, he wrote to his father asking for his permission to begin using the house. The father sent a letter permitting his son "to open the house and enter".[1)]

One can question the basis for such a rule in the changed context. One might speculate what would have happened if the father had refused permission and ordered that the house remain locked until a local medicine man performed certain rituals or until some other equally "irrelevant" event had taken place.

Another equally pertinent example may be added here from Tanzania. According to Kuria law, any property acquired by a son belongs to his father. For example, should a son participate in cattle raids and secure livestock he was expected to hand them over to his father. During the colonial period, this rule was used by Kuria fathers to require their sons who had gone into wage employment to surrender the money and other property they had acquired abroad. Some sons agreed reluctantly while others hid what they had got and kept their fathers ignorant of their wealth. In a recent study, Eva Tobisson, while working among the Kuria came across a dispute between a man and his son. One Mwita was employed in the police force for many years and had succeeded in gathering a large herd of cattle through sending money to his first wife to purchase cattle for him. When the herd was about thirty-head strong, Mwita announced his intention of marrying a second wife. He had identified a suitable girl through the help of his first wife and asked his father to assist him in the negotiations. His father refused to negotiate saying that the girl was not suitable. But since everyone in the village knew that she was a suitable girl, they begun to suspect the old man's intentions. After the marriage negotiations had broken down and Mwita had returned to his job in Dar es Salaam, the old man, Mwita's father, took the cattle and used them to marry a young wife for himself. In the opinion of Mwita's father it was contrary to Kuria law for Mwita to have two wives while his father had only one.

[1)] I am grateful to Nestor Ilahuka for drawing my attention to this case.

Such conflicts over property among the Kuria people and others in Tanzania are common. The rule which states that all the property acquired by a son belongsto his father is now used by fathers to appropriate their son's property which the latter have acquired outside the traditional sector. These rules could be obeyed when sor had practically no independent means of acquiring property. But now some sons have more wealth than their fathers. This development does threaten the balance of power in the household and often upsets upward social mobility which in pre-capitalist times was carefully regulated through the control exerted by elders on the economic activities of the young generation. New economic opportunities outside the traditional sector have created a new class of elders who are now competing with the traditional elders for wives and other scarce resources.

In the struggle to maintain control over resources, the elders use traditional law and religion to impose their will on the young generation. Since the young generation and women cannot successfully use the same weapon of tradition and religion, they turn to the state for support. In Tanzania courts have been helpful in resolving such disputes in favour of sons and wives. But courts can only apply law and the law has to be made by the Parliament. If no such law exists they have to make do with the existing customary law which they continue to reinterpret several times over, patching up as they meet new cases and new fact situations. I think Joan May (1979) has correctly summarised the situation when she states that:

> "Since the advent of the colonial period it has been public policy to refrain from altering the personal law of the colonized, and this has enshrined, almost immutably, laws which though functional in a system of agrarian, subsistence agriculture, composed of small village units, are very often dysfunctional in a more formal and rapidly modernising society."

But although the colonial policy of conserving traditional laws through their recognition and application in the courts may be seen superficially as a policy of non-interference in the internal affairs of the colonized people, it must be accepted that such non-interference was impossible to achieve in practice. Just as the policy of indirect rule (of which the policy of non-interference was a part) could not succeed without using colonial

administrators as puppet chiefs whose traditional role was turned upside down to serve colonial interests against their own people, the upholding of customary law by the colonial courts could only lead to injustice to the people whose social and economic systems were in a state of rapid change. Today traditionalism opposes law reform arguing that the people's traditions must be upheld.

Conclusion

What emerges from the entire paper is that African social formations have undergone such profound change that it is a retrogressive policy to impose on them traditional rules which arose out of and were part of the pre-capitalist social formation. This position must be taken irrespective of whether change is seen as a good thing or is regretted. Matin Chanock is right therefore when he says that it is ahistorical for anyone to imagine that there is in any African society a body of indigenous law "predating colonial rule and surviving in essence throughout the colonial period as an identifiable body of traditional African law that can still be used today" (p. 81).

This paper has stressed that claims to tradition, in the majority of cases, have not been based upon a realistic understanding of existing social and economic conditions. Sometimes the rules have been presented as traditional mainly as a strategy for gaining certain advantages or as a means of avoiding certain responsibilities.

Yet in making a case against traditionalism, I hope, I have not given the impression that African social formations have been totally transformed by capitalism. This would be another extreme position which is, so far as I know, not supported by contemporary research.[1] The reality lies midway; that is, although there has been a great change in social relations, this form of change has not resulted in the complete destruction of certain forms of pre-capitalist or traditional relationships. It is due to this partial transformation that traditionalism has had limited acceptability.

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1) For a different opinion on this point are especially Bernstein (1977) and Snyder (1981 b).

In an effort to understand contemporary social formations of the Third World, Peter Fitzpatrick has argued strongly that these formations are a result of a specific form of capitalist penetration whose effect has not resulted in a total destruction of the pre-capitalist forms of economic and social relationships. These contemporary formations exhibit the characteristics of the traditional and the capitalist forms - all combined together in one formation. From this new formation arise legal relationships which bear the characteristics of the traditional and the capitalist forms (1981).

There is no doubt that Fitzpatrick's contention is highly supported by the argument of this paper and I am of the opinion that his theory helps us to understand what is happening in most of Africa. Hence in countries where traditionalism is a strong force, there has not been much recognition of this crucial change. Consequently, there exists in those countries a situation which Joan May (1972:2) describes as extremely inadequate because the application of traditional law by courts in a variety of legal contexts often fails to cater for the needs of women which arise out of a major social change. There is an urgent need therefore, for most African countries to make a study of the extent of social change so that appropriate legal regulation can be devised to deal with the needs of social and economic development. In doing this, African states can undertake inovative law reforms with a view to directing the ongoing change.

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